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No. 89-1715

Supreme Court, U.S.
FILED
SEP 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CATHY BURNS
Petitioner,
vs.
RICK REED
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI, THE STATES OF WYOMING, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON AND WISCONSIN

IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS

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IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS

The authorized law officers of Wyoming, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire,

New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin[1] submit this brief *amici curiae* in support of Respondent Rick Reed, urging affirmance of the decision of the Seventh Circuit Court of Appeals in the case of *Burns v. Reed*, 894 F.2d 949 (7th Cir. 1990). This brief is submitted pursuant to Rules 37.3, 37.5 and 37.6 of the Rules of the Supreme Court of the United States.

INTEREST OF THE AMICI CURIAE

Attorneys General are the chief legal officers of their respective states.[2] Their duties include providing legal advice to state agencies and officials, representing the state in litigation, and advocating on behalf of the public in such areas as consumer protection and child support enforcement.[3]

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[1] In all of the states listed, except for Connecticut and the District of Columbia, the authorized law officer is the Attorney General, by and through whom these states appear. In Connecticut, the Chief State's Attorney exercises statewide prosecutorial authority, rather than the Attorney General. Therefore, it is that office which appears on behalf of Connecticut in cases such as this. Similarly, the Corporation Counsel serves as the chief legal officer of the District of Columbia, and appears on the District's behalf herein. Throughout this brief, the reference to Attorneys General should be read to include these authorized law officers as well.

[2] *State Attorneys General: Powers and Responsibilities* 12, 326, 337-338 (L. Ross, ed. 1990)[hereinafter cited as *State Attorneys General*].

[3] *State Attorneys General, supra* at 12-13; *see e.g.* Wyo. Stat. §§9-1-603(a), 9-1-606 (1977); Ala. Code 36-15-1(1), (3), (9), (13)-(15) and 36-15-12 (1975); Alaska Stat. §§44.23.020 (1989); Cal. Bus. and Prof. Code §320; D.C. Code §1-361 (1987 Replacement Vol.); Fla. Stat. §§16.01, 16.015 (1989); Idaho Code §§48-612, 67-1401; Ill. Rev. Stat. ch. 14, ¶4; ch. 121-122, ¶¶263-267; ch. 40, ¶1103 (1989); Iowa Code §13.1 *et seq.*; Mo. Rev. Stat. §27.060 (1986); N.H. Rev. Stat. Ann. §21-M:2 (1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §§42-9-3, 42-9-6, 9-31-6, 9-31-8; Tex. Gov't Code Ann. §§402.021, 402.042, 402.043 (Vernon 1990); Utah Code Ann. §67-5-1 (1988); Wis. Stat. §§165.105, 165.25.

Many Attorneys General have authority to initiate criminal prosecutions; some Attorneys General function as the principal prosecutor in their state, while others have authority to prosecute cases of state-wide jurisdiction, or cases involving state government officials, or to become involved in local cases in which the prosecutor has a conflict of interest.[4] Attorneys General are responsible for representing the state in criminal appeals to state and federal appellate courts.[5] As prosecutors, the Attorneys General have a direct interest in the outcome of this case, and its delineation of the scope of a prosecutor's immunity in preparing and presenting his case.

Attorneys General also provide legal advice to state agencies, officials and other clients. The duties of many of those clients involve the investigation of offenses ranging from violations of environmental laws to securities fraud. See, *e.g.* Cal. Gov't Code §§12600 *et seq.* and 15006; Idaho Code §67-2720; Minn. Stat. §45.027; Tex. Gov't Code Ann. §402.043 (Vernon 1990); Wis. Stat. §165.075. In addition, Attorneys General provide formal opinions on the law, including criminal law and procedure, which opinions are in turn relied upon by state officials and agencies, local

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[4] *State Attorneys General, supra* at 13, 38, 281-282; *State v. Jiminez*, 588 P.2d 707 (Utah 1978); Wyo. Stat. §§9-1-603(c), (d), 9-1-605(c), (d)(1977); Ala. Code §§36-15-13 through 36-15-16(1975); Alaska Stat. §44.23.020(b)(3)(1989); Cal. Gov't Code §§12550, 12553; D.C. Code §23-101(1989 Replacement Volume); Fla. Stat. §§16.01(4), (5), 16.52 (1989); Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.030(1986); N.H. Rev. Stat. Ann. §7:6(1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §42-9-2, 42-9-4; Tex. Gov't Code Ann. §§402.021 (Vernon 1990); Utah Code Ann. §67-5-1 (1988).

[5] *State Attorneys General, supra* at 13, 282-283; Wyo. Stat. §9-1-603(a)(ii)(1977); Ala. Code §36-15-1(3)(1975); Alaska Stat. §44.23.020(b)(1989); Cal. Gov't Code §12512; Fla. Stat. §§16.01(4), 16.52(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.050 (1986); N.H. Rev. Stat. Ann. §7:6(1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); Tex. Gov't Code Ann. §402.021 (Vernon 1990); Utah Code Ann. §67-5-1(1)(1988); Wis. Stat. §165.25(1).

prosecutors and law enforcement.[6] Attorneys General play a pivotal role in providing on-going legal information to prosecutors and law enforcement personnel.[7] The instant case directly presents the question of the scope of immunity when giving legal advice, the answer to which will directly affect the daily operation of the offices of Attorneys General throughout the country.

Finally, the Attorneys General are interested in this case because by serving as legal advisor to state civil rights agencies, initiating civil rights litigation, and promoting public education programs, they serve a critical role in safeguarding the civil rights of all citizens of their respective states.[8] Accordingly, their interest in this case is to ensure that the rights of all citizens are protected, and that the holding of *Imbler v. Pachtman*, 424 U.S. 490 (1976) is not contracted so as to unduly constrain the activities of the Attorneys General in providing the daily legal advice and prosecutorial functions that ensure the safety of all states' citizens.

SUMMARY OF THE ARGUMENT

The United States Supreme Court has held that prosecutorial conduct "intimately associated with the judi-

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[6] *State Attorneys General, supra* at 61-74, 279-282; Wyo. Stat. §9-1-603(a)(vi)(1977); Ala. Code §36-15-1(1)(1975); Alaska Stat. §44.23.020(b)(4)(1989); Cal. Gov't Code §12519; Fla. Stat. §16.01(3), 16.08(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.040 (1986); N.H. Rev. Stat. Ann. §7:8 (1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §42-9-6; Tex. Gov't Code Ann. § 402.042 (Vernon 1990); Utah Code Ann. §67-5-1(6) (1988); Wis. Stat. §§165.015, 165.25(3).

[7] *State Attorneys General, supra* at 279-281; Wyo. Stat. §9-1-603(a)(v), (d)(1977); Ala. Code §36-15-15(1975); Cal. Gov't Code §12519; Fla. Stat. §§16.54, 16.56(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.040(1986); N.H. Rev. Stat. Ann. §7:6-a(1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §42-28-20; Tex. Gov't Code Ann. §402.042 (Vernon 1990); Utah Code Ann. §67-5a-1(1990); Wis. Stat. §§165.50, 165.70, 165.75, 165.78.

[8] *State Attorneys General, supra* at 178-179, 254-260; see *e.g. Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

cial phase of the criminal process" is entitled to absolute immunity. This immunity is based on three factors: the common-law precedent granting absolute immunity to prosecutors, the risks associated with exposing the prosecutor to liability, and the availability of alternate remedies to redress wrongful conduct.

These factors are applicable to the prosecutorial activities of rendering legal advice and appearing before a magistrate to obtain warrants. The decision whether to file charges, which has been held to be shielded from liability, requires the gathering and review of evidence. Inherent in this activity is providing advice to the police officers who obtain information concerning a crime. Similarly, ensuring the accused's presence is critical to the state's case, and hence is part of the judicial process, entitled to absolute immunity.

Strong public policy reasons support immunizing such conduct from liability. Citizens benefit when police officers are encouraged to seek advice from prosecutors before taking action against putative defendants, and prosecutors must be able to exercise independent judgment in providing such advice. Prosecutors must often act quickly in the aftermath of a crime, and their ability and willingness to do so must not be constrained by fear of endless litigation resulting from their informed decisions.

ARGUMENT I

RENDERING LEGAL ADVICE AND APPEARING BEFORE A MAGISTRATE TO OBTAIN WARRANTS IS CONDUCT "INTIMATELY ASSOCITED WITH THE JUDICIAL PHASE OF THE CRIMINAL PROCESS" AND HENCE ENTITLED TO ABSOLUTE IMMUNITY.

In *Imbler v. Pachtman*, the Court established a functional analysis test to determine if challenged activities were "an integral part of the judicial process," "intimately associated with the judicial phase of the criminal process,"

and hence entitled to the shield of absolute immunity. *Id.*, 424 U.S. at 430.

In holding that such conduct was shielded from liability, the Court noted substantial public policy reasons supporting the grant of absolute immunity: unwarranted impact on the prosecutor's role by redirecting his energies to the defense of civil suits and affecting the independent exercise of his judgment in pursuing cases; and weakening of the criminal justice system itself. *Id.*, 424 U.S. at 422-427.

The focus on the judicial nature of the challenged activities, and application of the functional analysis test, were reiterated in later cases. *Butz v. Economou*, 438 U.S. 478 (1978). In *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983), this Court commented that "immunity rests on functional categories, not on the status of the defendant."

The Court has set forth three factors to be considered in determining the applicability of absolute immunity to a particular function: (1) the existence of an historical or common-law basis for immunity; (2) whether performance of the duty poses obvious risks of subsequent litigation against the official; and (3) whether there exist alternate means of redressing wrongful conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 521-523 (1985); see also *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), citing *Butz v. Economou*, 438 U.S. at 512. Challenged conduct must be reviewed in light of these factors and the public policy considerations articulated in *Imbler*, in determining whether absolute immunity is applicable.

A. *Rendering legal advice is a necessary duty of a prosecutor, beginning well before the actual filing of criminal charges. Subjecting a prosecutor to liability for his conduct in giving legal advice would inhibit his ability to prosecute criminal conduct and protect the public.*

The giving of legal advice, particularly to members of the law enforcement community, is intimately associated

with the judicial phase of criminal proceedings, and hence conduct entitled to absolute immunity. Many courts have underscored the judicial nature of the advisor role, and have found the shield of absolute immunity appropriate. *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d at 671; *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988).

The role of legal advisor begins well before the actual filing of criminal charges. *Imbler v. Pachtman*, 424 U.S. at 431, n. 33.[9] Activities inherent in this role include deciding whether to proceed with formal charges and obtaining the necessary search and arrest warrants, conduct which has been held entitled to absolute immunity. *Ehrlich v. Giuliani*, ___ F.2d ___ (4th Cir. 1990), as available at 1990 WESTLAW 112356; *Joseph v. Patterson*, 795 F.2d 549, 555-556 (6th Cir. 1986), *cert. denied* 481 U.S. 1023; *Henderson v. Lopez, supra*; *Hamilton v. Daley*, 777 F.2d 1207, 1213 (7th Cir. 1985); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983); *Marx v. Gumbinner*, 855 F.2d at 790.

In ascertaining whether specific conduct is of a "quasi-judicial" nature, and thus immune, courts have focused on the advocatory nature of the challenged activity. As the Sixth Circuit Court of Appeals noted in *Joseph v. Patterson*, 795 F.2d at 554, "[T]he critical inquiry is how closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the judicial phase

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[9] See also *Baez v. Hennessy*, 853 F.2d 73, 75 (2d Cir. 1988), *cert. denied* ___ *U.S.* ___, 109 S.Ct. 805 (1989) (misreading a grand jury voting sheet and preparing an erroneous indictment were activities "within the course of [the prosecutor's] official duties in the preparation and presentment of the indictment and thus absolutely immune"); *Barrett v. United States*, 798 F.2d 565, 571-572 (2nd Cir. 1986) (absolute immunity encompasses activities associated with potential litigation, such as initiating a prosecution or deciding against doing so); *Myers v. Morris*, 810 F.2d 1437, 1445-1446 (8th Cir. 1987), *cert. denied* ___ U.S. ___, 108 S.Ct. 97 (decision to file charges shielded by absolute immunity).

of the criminal process." A prosecutor's duty as an advocate intimately involved in the judicial phase of criminal proceedings begins almost as soon as the crime has occurred; evidence must be reviewed, facts marshalled, and a decision made whether to even proceed with the filing of charges. This decision sometimes cannot be made without appropriate development of the facts, which may require investigation. To expose prosecutors to liability for investigating whether charges should be filed would foster uninformed decisionmaking, *Lee v. Willins*, 617 F.2d 320, 322 (2nd Cir. 1980), and also mean liability for the failure to investigate, a claim that could be made in almost every case which proceeds to court, for every defendant could argue that if only the prosecutor had investigated more fully, no charges would have been filed.[10] Given the constraints of time, information and other resources with which prosecutors must contend, *Imbler v. Pachtman*, 424 U.S. at 425-426, such exposure to liability would cripple the criminal justice system, and cannot be countenanced.

The prosecutor's duty to seek justice, and to treat with impartiality all those involved at this most initial phase of the criminal proceedings, is recognized in both the American Bar Association Code of Professional Responsibility, Ethical Consideration 7-13(b), Disciplinary Rule 7-103, and in caselaw. *Palmer v. State*, 288 N.E.2d 739, 755 (Ind. App. 1974). Prior to the actual filing of charges is perhaps the time in the criminal proceedings when the prosecutor exercises the greatest discretion, and when the threat of litigation would most chill his ability to properly perform his role. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). Thus, the shield of absolute immunity must not be handed to a prosecutor only when he enters the courthouse door, but must be available to him as he initiates a prosecution.

[10] In *Martinez v. Winner*, 771 F.2d 424, 437 (10th Cir. 1985), the court noted that a failure to make an independent investigation is entitled to absolute immunity.

While in *Imbler* the Court explicitly reserved the question of whether absolute immunity also extended to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than an advocate," *id.* at 430-431, that reservation did not preclude the application of absolute immunity to either the rendering of legal advice or to conduct preceeding the actual filing of criminal charges, such as the obtaining of search and arrest warrants. The reserved question in *Imbler* should be answered by articulating that advocatory activities preceeding the formal filing of charges are "intimately associated with the judicial phase of criminal proceedings" and hence entitled to absolute immunity.

B. *The common-law immunity afforded to prosecutors in performing their various duties, including rendering legal advice and obtaining warrants, justifies affording absolute immunity to such conduct under 42 U.S.C. §1983.*

Under *Mitchell v. Forsyth*, 472 U.S. at 521, 523, one of the three factors to be considered in determining the applicability of absolute immunity to a particular function is the existence of an historical or common-law basis for immunity. Thus, the initial inquiry for the Court "is whether an official claiming immunity under §1983 can point to a common-law counterpart to the privilege he asserts." *Malley v. Briggs*, 475 U.S. at 339-340, citing *Tower v. Glover*, 467 U.S. 914 (1984); see also *Imbler v. Pachtman*, 424 U.S. at 422, n. 20.

The office and duties of Attorneys General have roots in the common law. The first Attorney General in England was appointed in the mid-thirteenth century, and had the authority to prosecute serious criminal cases and conduct special investigations.[11] The role and duties of the Attorney General developed over the succeeding centuries, and were brought to the New World, where the first colonial

[11] *State Attorneys General, supra* at 3-4.

Attorney General was appointed in 1643.[12] Seven delegates to the Constitutional Convention either had served or would serve as the Attorney General of their colony or state.[13] Eventually, all states created the office of Attorney General, either in the state constitution or by statute.[14]

A summary of the common law powers of a state Attorney General was set forth in *State v. Warren*, 180 So.2d 293, 299 (Miss. 1965):

> At common law the duties of the attorney general, as chief law officer of the realm, were numerous and varied. He was chief legal adviser to the crown, was entrusted with management of all legal affairs, and prosecution of all suits, civil and criminal, in which the crown was interested. He had authority to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state, and to intervene in all actions which were of concern to the general public.[15]

The variety of duties required of Attorneys General has spawned a number of suits. In most cases, courts have found those activities which were prosecutorial in nature to be entitled to absolute immunity. *Mother Goose Nursery Schools, Inc. v. Sendak, supra; Henderson v. Lopez, supra; Marx v. Gumbinner, supra.* As noted by the Seventh Circuit, "the dispositive question is whether the conduct of the prosecutor is of a judicial nature and requires the prosecutor to exercise analogous judgment." *Burns v. Reed*, 894 F.2d at 955. This question relates back to the

[12] *Id.* at 5-6.
[13] *Id.* at vii.
[14] *Id.* at 8-9, 337-338.
[15] This case summarized the frequently-cited list from the case of *People v. Miner*, 2 Lans (NY) 396 (1868). See also *State Attorneys General, supra* at 35-39; *State v. Jiminez*, 588 P.2d 707 (Utah 1978); *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

common law foundation of the immunity granted to judges: if the prosecutor's conduct is sufficiently related to judicial conduct, the same historical basis exists for the grant of absolute immunity. *Imbler* was but one of a series of cases in which the Court recognized "the common-law precedents extending absolute immunity to parties participating in the judicial process: judges, grand jurors, petit jurors, advocates, and witnesses." *Butz v. Economou*, 438 U.S. at 509; see also *Yaselli v. Goff*, 275 U.S. 503 (1927). The conduct of a prosecutor in locating evidence and securing the presence of the accused is as related to the judicial process as is the decision to file charges, and thus is entitled to absolute immunity. *Ehrlich v. Giuliani, supra.*

C. *Adequate alternate remedies exist to curtail inappropriate conduct in rendering legal advice or obtaining warrants.*

One of the reasons absolute immunity was afforded to prosecutorial conduct in *Imbler v. Pachtman*, 424 U.S. at 427-428, was that adequate alternate means existed by which to curtail inappropriate activities. The filing of criminal charges for willful deprivations of constitutional rights was noted. *Id.* The Court also emphasized that prosecutors are unique in that they are also subject to professional discipline, which discipline can result in loss of the privilege to practice law. *Id.* at 429; see also *Malley v. Briggs*, 475 U.S. at 343, n.5.

These avenues of relief are equally available in the instant case. In addition, in cases which might involve suits against the Attorneys General or their staff in their role as prosecutors, it should be noted that Attorneys General are answerable either to the electorate, or in those states with appointed Attorneys General, to the appointing authority.[16] Attorneys General may also be removed from office

[16] *State Attorneys General, supra* at 15-23; Wyo. Stat. §9-1-601(a)(1977); Alaska Const. art. III, §25; Cal. Const. art. V, §11; Idaho Code §34-612; Ill. Const. 1970, art. V, §1; Mo. Rev. Stat. §27.010 (1986); N.H. Rev. Stat.

by impeachment, recall, or removal by the appropriate appointing authority.[17] These remedies, as well as those such as an injunction halting further prosecutorial action, or the filing of criminal proceedings under 18 U.S.C. §242, ensure that shielding prosecutorial conduct from liability under 42 U.S.C. §1983 will not allow misconduct to flourish.

It should be noted that prosecutors have been afforded immunity from damages not only because alternate remedies exist, but also because damages are an inappropriate device for curbing prosecutorial abuse. Many victims of prosecutorial bad faith would be unable to recover because they are incarcerated, unable to discover the bad faith, or otherwise unable to bring suit. Moreover, since recovery would depend on prosecutorial motive, not the extent of the victim's injury, any compensation might be unrelated to the amount of compensation to which the victim is truly entitled.

The inappropriateness of damages relates back to the public policy reasons supporting the grant of absolute immunity to prosecutors for conduct "intimately associated with the judicial phase of the criminal process." This Court has articulated the need to protect the criminal justice system itself, and preserve the prosecutor's independent exercise of judgment in pursuing cases. *Imbler v. Pachtman*, 424 U.S. at 422-427. Other public policy reasons include the concern that "potential liability could deter prosecutors from revealing errors and from responding quickly once they become aware of a problem," *Ehrlich v.*

Ann. §7:8, 7:9(1988); Pa. Const. Ann., art. IV, §4.1(Purdon 1990 Supp.); Utah Const. art. VII, §1.

[17] *State Attorneys General, supra* at 24-25; Wyo. Stat. §§9-1-601(a), 9-1-202(a)(1977); Ala. Const. of 1901 art. VI, §173; Alaska Const. art. III, §25; Cal. Const. art. IV, §18; Idaho Code §34-1701 *et seq.*; Ill. Const. 1970, art. IV, §14; Mo. Const. art. VII, §1; N.H. Const., pt. 2, art. 38; Pa. Const. Ann., art. VI, §6 (Purdon 1969); Utah Const. art. VI, §19; Wis. Stat. §17.06.

Giuliani, supra, the concept that officials owe a duty to the public rather than to specific individuals, and the fear that exposure to unwarranted liability would deter individuals from seeking public positions. *Robichaud v. Ronan*, 351 F.2d 533, 535 (9th Cir. 1965).

The conduct of a prosecutor in rendering legal advice prior to the filing of charges, or in obtaining search and arrest warrants, is sufficiently related to the judicial phase of the criminal process to require absolute immunity. As in *Malley v. Briggs*, 475 U.S. at 342, the acts are shielded from liability "not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself."

ARGUMENT II

REMOVING THE GIVING OF LEGAL ADVICE, AND THE OBTAINING OF WARRANTS, FROM THE RANGE OF PROTECTED CONDUCT WILL GREATLY HINDER THE WORKINGS OF PROSECUTORS AND ATTORNEYS GENERAL.

The scope of activities in which Attorneys General engage was described above. If the ruling in *Imbler* were contracted so that the giving of legal advice was not afforded the shield of absolute immunity, the consequences would be detrimental to the functioning of Attorneys General and their staff. Attorneys General would be constrained from offering advice to prosecutors, state officials and agencies for fear that litigation would result every time an attorney spoke with a client.

Attorneys General are required in most states to provide formal opinions on the law.[18] Such opinions may be

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[18] *State Attorneys General, supra* at 61-65; Wyo. Stat. 9-1-603(a)(vi) (1977); Ala. Code §§36-15-1(1) and 36-15-15(1975); Alaska Stat. §44.23.020 (b)(4) (1989); Cal. Gov't Code §12519; Fla. Stat. §§16.01(3), 16.08(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Minn. Stat. §§8.05 through 8.07; Mo. Rev. Stat. §27.040(1986); N.H. Rev. Stat. Ann. §§7:7,

rendered to local prosecutors. See, *e.g.* Wyo. Stat. §9-1-603(a)(v), (vi)(1977); Cal. Gov't Code §12519; Ill. Rev. Stat. ch. 14, ¶4(1989); Minn. Stat. §8.07; Wis. Stat. §165.25(3). In addition, many Attorneys General are involved in preparing and presenting educational information to law enforcement and state peace officer standards and training commissions.[19] If the giving of legal advice subjects the attorney to liability, such activities may well cease, which is contrary to one reason absolute immunity was extended to prosecutorial conduct in the first place: preservation of the functioning of the criminal justice system. *Imbler v. Pachtman*, 424 U.S. at 426. As the Seventh Circuit Court of Appeals noted in *Burns v. Reed*, 894 F.2d at 955-956:

> [P]olice officers do turn to a prosecutor when they are uncertain about the legality of a possible investigative technique. And this is as it should be. We do not hesitate to recognize that the decision at hand should be guided, in part, by sound policy considerations. With that in mind, it is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutors from fulfulling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques, and the possibility that their proposed conduct will violate the rights of their suspects.

7:8, 21-M:2(1988); Pa. Stat. Ann., Tit. 71, §§ 732-101 through 7-32-506 (Purdon 1990 Supp.); R.I. Gen. Laws §§42-9-6, 42-28-20; Utah Code Ann. §67-5-1(6)(1988); Wis. Stat. §165.015.

[19] *State Attorneys General, supra* at 279-282; see *e.g.* Mo. Rev. Stat. §27.040(1986).

The Court noted in *Imbler* that the danger in exposing a prosecutor to liability is not from the outcome of the litigation itself, for indeed many lawsuits would not be successful, but from the expenditure of resources in defending against such suits. *Imbler*, 424 U.S. at 419 n. 13; *Burns v. Reed*, 894 F.2d at 954, n. 3; *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The attention and resources of the Attorneys General would be redirected from providing the best legal advice possible and ensuring that the rights of all citizens are protected, to defending against potential litigation. *Burns v. Reed*, 894 F.2d at 955-956.

Taking the path urged by Petitioners (brief at 31) would encourage, if not in fact mandate, that prosecutors exercise no independent judgment prior to the actual filing of charges, although the exercise of that independent judgment frequently results in no charges being filed and therefore, protects all citizens from indiscriminate prosecution. *Marx v. Gumbinner*, 855 F.2d at 790. Limiting the protection of absolute immunity to the filing of charges and subsequent activities would both diminish the amount of much-needed legal advice that prosecutors and Attorneys General render and increase the number of charges actually filed, leaving the judicial system to sort out the cases in which charges should not have been filed, and expanding the risks of citizens being exposed to illegal police tactics. This would not only burden our legal system but would also have a negative impact on all citizens of this country, who could no longer count on prosecutors to prevent frivolous prosecutions.

This case presents the Court with an opportunity to articulate a bright-line rule, abandoning the case-by-case approach which undercuts the very reasons supporting absolute immunity. The rationale underlying absolute immunity is to defeat a suit at the outset, "avoid[ing] the personal, institutional and social cost associated with such suits." *Burns v. Reed*, 894 F.2d at 954, n. 3, quoting *Harlow v. Fitzgerald*, 457 U.S. at 814. The functional analysis test,

however, has required a case-by-case review of whether the questioned conduct falls on the investigatory or prosecutorial side of the immunity line, during which review many cases proceed through the court system, see *e.g. Marx v. Gumbinner*, 855 F.2d at 789, n. 10., subjecting the prosecutor to suit and incurring the very costs sought to be avoided. In order to encourage the prosecutor's exercise of independent judgment, and to preserve his discretion in pursuing cases, the line of absolute immunity must be drawn to include the activities of Respondent in this case.

CONCLUSION

For the reasons stated above, amici urge affirmance of the decision of the Seventh Circuit Court of Appeals in the case of *Burns v. Reed*, 894 F.2d 949 (7th Cir. 1990).

Respectfully submitted,

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